IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

RSA.No. 813 of 2007()

RFA.49/2004 of II ADDL. DISTRICT COURT, KOLLAM
OS.309/1994 of PRL.M.C., KOLLAM
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APPELLANT/RESPONDENT NO.1/DEFENDANT NO.1

MADHAVAN, S/O. NEELAKANTAN,
MADHAVA VILASOM, MATHILILCHERRY,
THRIKKADAVOOR VILLAGE.

BY ADV. SRI.P.VIJAYA BHANU
SRI.M.GEORGE THOMAS

RESPONDENTS: APPELLANT/RESPONDENT NO.2/PLAINTIFF/DEFENDANT NO.2
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1. CHRISTY FRANCIS,
KANDACHAMKULATHU VEEDU, MATHILILCHERRY,
THRIKKADAVOOR.

2. MADHAVAN BABU,
MADHAVA VILASOM, MATHILILCHERRY,
THRIKKADAVOOR VILLAGE.

BY ADV. SRI.ALEX N.MATHEW (KOLLAM)
SRI.H.RAMANAN
SRI.JAMES JOSE

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 14/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A.No.813 OF 2007

Dated this the 14th day of November, 2007

JUDGMENT

First defendant in O.S.No.309/1994 on the file of Munisiff Court, Kollam is the appellant. First respondent is the plaintiff and second respondent, the second defendant in the suit. First respondent instituted the suit for fixation of boundary and for permanent prohibitory injunction. Plaint schedule property is 48 cents in Survey No. 7547 of Thrikkadavoor village. Admittedly it originally belonged to Sara Francis, mother of first respondent who died on 10/03/1994. First respondent claimed title to the plaint schedule property under Ext.A1 settlement deed dated 10/03/1994. It was contended that first respondent has title to the plaint schedule property and he is entitled to get the boundary fixed in accordance with the description given in Ext.A1. Appellant filed a written statement contending that he has got title of 10 cents of the property adjacent to the plaint schedule property and the existing boundaries separating the properties were destroyed by first respondent and his attempt is to construct a boundary wall annexing a portion of the property of appellant and he has no right to do so and therefore he is not

entitled to the decree sought for.

2. Learned Munisiff on the evidence of PWs 1 and 2, DWs 1 to 4 and exhibits A1 to 15, B1 and B2and C1 to C7 (b) found that first respondent has title to the plaint schedule property under Ext.A1. Relying on Ext.C7(a) plan, boundary was fixed and KJX line was fixed as eastern boundary separating the property of the appellant from property of first respondent. First respondent plaintiff challenged the decree and judgment before District Court, Kollam in R.F.A. NO. 49/2004. Learned Additional District Judge on appreciation of evidence found that the property obtained by appellant under Ext.A14 is the right transferred under Ext.A15 gift deed and as per Exts.A15 and A14 the property obtained by the appellant is the property covered within the side measurement shown in the document and it is not 10 cents but only 8.9 cents and the property obtained by first respondent under Ext.A2 is the property excluding the said 8.9 cents as de-marked by the Commissioner in Ext.C7(a). First appellate court therefore re-fixed the boundary as KJI line as marked in Ext.C7(a) plan and modified the decree accordingly. It is challenged in the second appeal.

3. Learned counsel appearing for the appellant was

heard. Argument of learned counsel is that under Ext.A14 the property purchased by appellant is 10 cents and Ext.A15 also shows that 10 cents was gifted in favour of the assignor under Ext.A14 and therefore finding of first appellate court that appellant has right over only 8.9 cents is not sustainable. Learned counsel also argued that even though Exts.A14 and 15 contains side measurements, intention of the parties is to be taken into consideration and what was intended was not to transfer the property covered within the side measurement, but 10 cents and therefore first appellate court was not justified in interfering with the decree granted by the trial court. Reliance was placed on the decision of this court in **Moideenkutty Haji v. Mohammedali** (1987(2)KLT 994) and **Raghavan v. Chirutha** (1991(2)KLT 385). Learned counsel also argued that Ext.A1 settlement deed shows that the property given to first respondent is excluding the 10 cents, which is the property obtained by appellant under Ext.A14 and A15 and the decree is not sustainable.

On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Appellant is claiming right under Ext.A14. The right obtained under Ext.A14 is the right

originally transferred under Ext.A15. True, both Exts.A14 and 15 show that the property transferred is 10 cents. But as rightly found by the first appellate court, what was transferred under Ext.A15 originally and thereafter by the donee under Ext.A14 is the property covered within the side measurements shown .When the documents show that properties were measured and side measurements were fixed and that property was gifted originally under Ext.A15 and thereafter transfered under Ext.A14, the property has to be fixed not with reference to the extent shown in the document, but with reference to the side measurements. If that be so, it can only be 8.9 cents and not 10 cents as canvassed by the appellant. True, Ext.A1 also shows that the property settled in the name of the first respondent is excluding 10 cents originally transferred under Ext.A15. But the said 10 cents referred to therein is with reference to the transfer made earlier under Ext.A15 gift deed. Therefore the crucial question is what is the property transferred under Ext.A15. If it is the property covered within the side measurement, then what was excluded at the time of execution of the settlement is only that property and not 10 cents. It is on that basis, first appellate court rightly found that appellant is only entitled to 8.9 cents and

refixed the boundary in accordance with Ext.C7(a) plan as KJI line. In such circumstances, appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

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